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9561 7590 07/30/2009 POPOVICH, WILES & O'CONNELL, PA 8519 EAGLE POINT BLVD SUITE 180 LAKE ELMO, MN 55042				
EXAMINER				
ERIZO, DARWIN P				
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Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte JOHN C. OSLUND and CHAD J. VOLK

Appeal 2009-001299
Application 10/823,139
Technology Center 3700

Decided:¹ July 30, 2009

Before WILLIAM F. PATE, III, LINDA E. HORNER, and
STEVEN D.A. MCCARTHY, *Administrative Patent Judges*.

HORNER, *Administrative Patent Judge*

DECISION ON APPEAL

¹ The two-month time period for filing an appeal or commencing a civil action, as recited in 37 C.F.R. § 1.304, begins to run from the decided date shown on this page of the decision. The time period does not run from the Mail Date (paper delivery) or Notification Date (electronic delivery).

John C. Oslund and Chad J. Volk (Appellants) seek our review under 35 U.S.C. § 134 of the Examiner's decision finally rejecting claims 71-73, 75-77, and 79-81. Claims 1-70 have been canceled, and claims 74, 78, and 82 have been withdrawn from consideration. We have jurisdiction under 35 U.S.C. § 6(b) (2002). We REVERSE.

The Appellants' claimed invention is a distal protective device having a filter basket that is maintained in the fully opened configuration after deployment and during use. Spec. 3:13-15. Claim 71, reproduced below, is representative of the subject matter on appeal.

71. A distal protection device disposable within a vessel of a body comprising:
- a guidewire;
 - a tube having a lumen sized to receive the guidewire;
 - a filter basket connected to the tube, the filter basket having a closed distal end and an open proximal end; and
 - a spacing member connected to the tube and positioned proximally of the proximal end of the filter basket, the spacing member being configured to maintain the proximal end of the filter basket in an opened configuration when the device is deployed within the vessel.

The Appellants seek review of the Examiner's rejection of claims 71-73, 75-77, and 79-81 under 35 U.S.C. § 102(e) as being anticipated by Khosravi.

The Examiner found that a first region of Khosravi's blood permeable sac corresponds to the claimed filter basket, and a second region of the blood permeable sac, which is hemmed to include two spines, corresponds to the claimed spacing member. Ans. 4-5.

The Appellants contend the Examiner erred in finding that Khosravi discloses a spacing member positioned proximally of the proximal end of the filter basket, because Khosravi's blood permeable sac wraps around the spines, and thus the spines are distal to a portion of the sac. Br. 6

The issue presented by this appeal is:

Have the Appellants established that the Examiner erred in finding that a first region of Khosravi's blood permeable sac corresponds to the claimed filter basket and a second region of Khosravi's blood permeable sac corresponds to the claimed spacing member?

Independent claims 71, 75, and 79 call for a spacing member positioned proximally of the proximal end of the filter basket. The Appellants' Specification describes, with reference to the embodiments shown in Figures 1, 8 and 12, a loop spacer 28, 44, attached to a ferrule 16 and positioned on the guidewire at a location proximal to the opening of the filter basket. Spec. 4:18-20, Spec. 9:5-8, Spec. 9:24-25; Figs. 1, 8 and 12.²

By contrast, Khosravi discloses a vascular device 130 in which the proximal end of a blood permeable sac 136 (filter basket) is wrapped around

² The Appellants' Summary of Claimed Subject Matter in the Brief refers only to the embodiments of Figures 1, 8, and 12 as support for the claimed distal protection device. Br. 4-5. The claims are not directed to the embodiments of Figures 13 and 14.

a support hoop 135 (spacing member) such that a portion of the blood permeable sac 136 is disposed proximally of the support hoop 135 (Khosravi, col. 10, ll. 5-21; Figs. 11A-11C.). As such, the proximal end of Khosravi's blood permeable sac is located proximally of the support hoop. Thus, Khosravi does not disclose a spacing member positioned proximally of the proximal end of the filter basket, as required by independent claims 71, 75, and 79. For the same reason, Khosravi does not anticipate claims 72 and 73, claims 76 and 77, and claims 80 and 81, which depend from claims 71, 75, and 79, respectively.

The Appellants have established that the Examiner erred in finding that a first region of Khosravi's blood permeable sac corresponds to the filter basket and a second region of Khosravi's blood permeable sac corresponds to the spacing member.

The decision of the Examiner to reject claims 71-73, 75-77, and 79-81 is REVERSED.

REVERSED

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